United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7127

ORIGINAL

To be argued by
LESTER E. FETELL

United States Court of Appeals

FOR THE SECOND CIRCUIT

JACKSON O. KING,

Plaintiff-Appellee,

—against—

DEUTSCHE DAMPFS-GES,

Defendant and Third-Party Plaintiff-Appellee-Appellant,

—against—

INTERNATIONAL TERMINAL OPERATING CO. INC. and COURT CARPENTRY & MARINE CONTRACTING COMPANY,

Third-Party Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE

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PLAINTIFF-APPELLEE'S BRIEF

Statement

The judgment entered herein is in favor of plaintiff-appellee against defendant-appellant (also Third Party Plaintiff-Appellee) Deutsche Dampfs-Ges ("shipowner"). The shipowner is only nominally an appellant vis-a-vis

the plaintiff, its Notice of Appeal being designated as a "Protective Appeal" (585a), Shipowner has filed no brief in support of said protective appeal, and apparently will rely upon the arguments put forth by co-appellants International Terminal Operating Co. Inc. (ITO) & Court Carpentry & Marine Contracting Company (Court).

The Issues

Plaintiff was a marine carpenter in the employ of Court. He sustained the injuries resulting in a jury verdict in his favor while working in the hold of the M/S TRAUTENFELS, which he entered in order to secure the cargo previously loaded into the hold (42a), consisting of steel beams. To accomplish his work, plaintiff was required to walk directly on the beams. The beams were faced fore and aft (47a). He stepped into a space between the beams (52a).

The verdict in favor of plaintiff was actually the second favorable jury assessment of liability and damages; the trial Court (Motely, J.) having granted judgment n.o.v. after the first trial, and having directed a new trial on the issue of unseaworthiness only.

The issues as between shipowner and ITO and Court, in respect to indemnity, do not concern the plaintiff, and no reference to these issues will be made in plaintiff's brief. Clearly, Court's appellate attack on plaintiff's judgment against shipowner is a legal reaction to the trial Judge's direction of an indemnity verdict against Court.

THE LAW

POINT I

The trial record supports the jury verdict in favor of plaintiff on the facts and on the law.

It is not disputed that plaintiff was a member of the class of workers to whom the shipowner owed a warranty of seaworthiness. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85; *Salgado* v. *M. J. Rudolph Corp.,* U. S. Court of Appeals, Second Circuit, (No. 374, March 24, 1975, at page 2458).

The sole issue here is whether the facts alleged by plaintiff created a submissible jury issue. Appellees urge that by reason of *Nuzzo* v. *Rederi, A/S Wallenco,* 304 F 2d 506 (2nd Circ, 1961) the court below should have dismissed the complaint as a matter of law. Plaintiff-appellee urges that appellants' argument is without merit and must fall.

As the New York State Court of Appeals stated in *Sadowski* v. *L.I.R.R.,* 292 N. Y. 448, 455:

> "Essentially what is negligence is a question of fact. Each case depends on its own peculiar circumstances. Decisions in other actions in which damages are sought for personal injuries furnish no criteria or guide for determination of what is or is not negligence in a particular case involving its own peculiar facts and circumstances, negligence arises from breach of duty, and *is relative to time, place and circumstances*" (italics added).

The same holds true for cases involving unseaworthiness.

Unseaworthiness is a question of fact for the jury. As this court stated in *Rice* v. *Atlantic Gulf & Pacific Co.*, 484 F 2d 1318, 1321:

> "We must keep in mind the liberal attitude toward unseaworthiness claims such as the present one (citing cases). . . . where special deference has been accorded to jury findings."

The issues then is whether spaces in cargo, upon which Sieracki seamen are required to work and walk, may be found by a jury under proper instructions, to have rendered the vessel unseaworthy. That issue was reviewed by Judge Sobeloff in *Venable* v. *A/S Forenede Damp.*, 399 F. 2d 347 (CA 4th 1968):

> "The fact that spaces are necessarily present between hogsheads and that longshoremen knowingly subject themselves to the hazard, are not mitigating factors. Recognizing that these men are constrained to accept without critical examination and without protest, working conditions and appliances as commanded by their superior officers the Court has declared repeatedly that they are not deemed to assume the risk of unseaworthiness (citing cases)"
>
> * * *
>
> "It therefore became his absolute duty to make the surface safe for that type of work."

see also: *Noble* v. *Lehigh Valley RR Co.*, 388 F 2d 532 (C/A 2nd 1968) wherein this court reiterated the proposition that the seaworthiness doctrine extends to the hull, the decks, the machinery, the tools furnished, *the stowage,* or the cargo containers, and that they must be reasonably fit for their intended purpose. See also: *Usner* v. *Luckenbach Overseas Corp.*, 400 U. S. 494.

The jury verdict in favor of plaintiff, at bar, subsumes a finding that the cargo stowage was not reasonably fit, and that the vessel was thus rendered unseaworthy.

Appellant persistently refers to the testimony of the carpenter foreman Auletti, who frankly admitted that it is not unusual to come upon open spaces in the stow:

> "A: We come upon all kinds of spaces on the waterfront. You got open hatchcovers, broken handles" (173a).

Auletti made this admission each time the defendants' attorneys asked the question, and it is to be noted that the question was repeated again and again (Court brief, p. 13). It is urged that appellants misinterpret what Auletti had in mind when he admitted that open spaces are common.

> "A: Well, no. It's all according to who is loading them. *If you get a gang that's good, they keep the beams together.* If you got a gang that we got today, they leave them like that. The majority of the men on the waterfront don't want to work any more" (175a). (italics added)

Auletti was decrying the fact that unsafe, or unseaworthy conditions are becoming more common these days. Appellants seem to be suggesting that this dangerous practice is now so common that it has risen to an acceptable standard of conduct, an invalid distortion of logic.[1] Judge Oakes, in *Salgado* v. *M. J. Rudolph Corp.*,

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[1] ITO's foreman Pinto, testified by deposition wherein he admitted that "My orders were to put them as close to each other as possible and that is what I tried to do" (207a). "The only thing I know is I put them down there and I tried to get them as close as possible." (209a); "We tried to get them all even, sir" (210a). This admission by stevedore's foreman squares with the testimony of Auletti that proper stowage requires that the beams be together. The jury thus had a proper standard or bench mark to test whether the stow was or was not reasonably fit.

supra had occasion to point up the fact that stevedoring (which includes the work of all Sieracki seamen engaged in cargo handling) is "in fact, one of the most hazardous occupations." He cited the statistics which show that the accident frequency rate is 92.3 per million man hours worked. (*Salgado* v. *M. J. Rudolph,* supra at 2460, footnote 7). If anything, Auletti's testimony points up the *raison détre* for the liberality of the unseaworthiness doctrine, and the basis for Judge Sobeloff's cited language in *Venable,* supra.

The trial Court properly charged the jury with respect to the elements of unsafe stowage of cargo (cf. 468a et seq.).

The record at bar presents a classic case of an alleged improper stow, from which a jury could determine whether the vessel, in the condition which King came upon the hold, was reasonably fit. In view of the fact that the issue here was limited to the question of seaworthiness, there can be no argument that the jury was confused, as is often the case where there is a mixed issue of negligence and unseaworthiness. The jury made its finding, and such finding, on this record, should be immune from reversal.

Appellant Court Carpentry presents inconsistent arguments, with respect to the same set of facts, depending on whether Court is attacking the underlying judgment, (in favor of plaintiff, against shipowner), or attacking the judgment n.o.v. (in favor of shipowner, against Court). The very arguments, of law and fact, which Court submits in opposition to the third party judgment, are those arguments which actually support plaintiff's position herein (cf. Court Brief, p. 18 et seq.), to wit: the inviolability of jury findings: n.b.

> "The primary purpose of such amendment is the preservation of the common law distinction between the province of the Court and that of the jury where issues of law are resolved by the Court, and issues of fact are resolved by the jury under instruction from the Court" (Court Br. 18).

The record at bar amply demonstrates that insofar as the primary action herein is concerned, the trial Court followed the mandate of the Seventh Amendment to the U.S. Constitution.

It ill behooves appellee, Court, to transmute plaintiff's claim into a question of law, when at the same time, it seeks to preserve the jury's determination vis-a-vis the third party action, when both were bottomed upon the self same set of facts.

If *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines,* 369 U. S. 355 (Court Br. 19), is the law, then appellant Court's arguments in opposition to the verdict of the jury must fall. What the ultimate effect of this jury finding is with respect to the indemnity actions is irrelevant, in the context of the prime action against the vessel for breach of the warranty of seaworthiness.

Appellants overstress *Nuzzo* v. *Rederi,* supra, which on its facts, and the law evolving from those facts, is inapposite. Nuzzo did not involve an improper stow of cargo. The plaintiff and a co-longshoreman both testified that "It was a good lumber stow" and that "Up to the time (Nuzzo) fell, the lumber had been stowed properly". The graveman of Nuzzo's complaint was that a space was left between the skin of the ship and the ends of the boards or planks, which formed the stow. Nuzzo testified that while maneuvering a bundle into position,

he stepped backwards into the "empty space between the vertical ribs of the bulkhead".[2]

At bar, the testimony was that there was a *"space between the beams"* (52a):

> "Q: You made a turn to your right, is that what before your foot went into a space?
> A: I guess one or two steps.
> Q: *Was that still on the H-beam?*
> A: *Yes. That's where I fell, through the H-beam."* (italics added)

The case at bar equates with *Venable,* supra, more or so than it does with *Nuzzo,* supra. The distinction, from a reading of these cases and the record at bar, is that in *Nuzzo* the essence of the claim was that while *the stow was proper,* the vessel or hold were unseaworthy, in that a space was left between the skin of the ship and the cargo stow. At bar, we urge that the *stow itself was improper.* The distinction is far from a semantic one. Judge Hincks, in *Nuzzo,* summarized the rationale for the dismissal as follows:

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[2] ITO's foreman, Pinto's testimony (206a, 207a) demonstrates that the space into which plaintiff King fell was not on the perimeter of the hold:

> "Q: How close to the port side did you get them? In other words, did you get them to the skin of the ship on the port and starboard side?
> A: No, we didn't go all the way inside.
> Q: How far did you go?
> A: Right in the square of the hatch.
> Q: Did any of them extend under the coaming?
> A: We went as far as we could underneath the coaming. *Maybe we went a foot inside the coaming, to the best of my knowledge"* (italics added).

The factual disparity between this case and Nuzzo is patent in the light of ITO's testimony.

> "The mere fact that there was at a point in the *perimeter* a small empty space extending two feet below the adjacent 'floor' of boards was not enough by itself, as we read Mitchell v. Trawler Race, supra, to violate the standard of reasonable fitness prescribed by that opinion." (italics added)
>
> * * *
>
> "And that, so far as appears, none of these holes between bundles *existed under the hatch where the longshoremen were continuously working, but only at the perimeter of the hold between the bundles and the bulkhead where they had little occasion to be.*" (italics added)

It must be recalled that *Nuzzo* was a non-jury case, wherein the findings of fact are more readily reviewable on appeal, and wherein the facts "were expressed orally from the bench" and were not overly clear to the Circuit Court (*Nuzzo,* supra footnote 1). The dissent of Judge Clark reveals that the facts in *Nuzzo* obscured some very fundamental problems in the law of seaworthiness. *Noble* v. *Lehigh Valley* and *Venable* v. *Forenede,* supra, coming some six years after *Nuzzo* are better reflections of the law in this area than is *Nuzzo.*

Nuzzo does not support a dismissal of the complaint herein, as urged by appellants.

POINT II

The Trial Court did not commit reversible error in its rulings addressed to the testimony of Andrew Auletti.

Appellant Court argues that Auletti was permitted to give *expert testimony*. This is not in accord with the record. Auletti testified to what he had *observed* while working with cargo for some 27 years, of which some 10 to 12 years were spent with Court Carpentry (140a). Auletti was never called upon to draw any conclusions or give an opinion with respect to his factual testimony.

Mr. Auletti was asked, without objection, what the work of the marine carpentry gang was, in connection with a cargo loading operations. He answered:

> "A: Well, you have a gang of carpenters working and a gang of lashers. *We secure the cargo before it goes out to sea*" (141a). (italics added)

From the very fact that Court Carpentry was engaged to lash cargo, the jury could reasonably conclude that unlashed cargo was unsafe cargo. The highly experienced foreman of the lashing gang was a proper person to ask questions in respect to lashing and chocking.

Appellant Court argues:

> ". . . on redirect examination plaintiff's counsel was permitted to elicit testimony from him (Auletti), over objection, that the proper way of loading and stowing steel beams was to stow them tightly together" (Court Br. 13).

Court argues that Auletti was "not qualified as an expert on *stevedoring* operations". This is a non sequitur.

Who is better qualified to discuss stowing cargo tightly together than the very people who constantly work with cargo? To employ the words "stevedoring operations" is to beg the question. What is a stevedoring operation? Obviously an operation involving the loading and discharge of cargo; the fact that the work is subdivided among longshore gangs, and carpentry lashing gangs is of no consequence. The argument is similar to stating that a medical doctor, specializing in general practice is not qualified to answer questions concerning the removal of an appendix.

A similar argument was made, and rejected by this court in *Avena* v. *Clauss & Co.*, 504 F 2d 469 (C. A. 2d, 1974):

> "No argument has been made to us, or to the court below, that plaintiff—a longshoreman with 31 years of experience at the time of trial—lacked sufficient expertise to testify to custom in the trade regarding the movement of cargo. cf. Tropea v. Shell Oil Co., 307 F 2d at 763 (service station operator of 20 years qualified to testify to custom of trade in disposing of waste pumped from full storage tanks); T. H. Browning S.S. Co. v. Peavey Co., 235 F 2d 5, 9 (8th Cir. 1956) (witness who had been a seaman on Great Lakes for 25 years and Chief Engineer for a number of years qualified to give evidence as to customary manner of conducting dock tests). *Besides, expert testimony may not even have been required since the behavior at issue (use of metal band to drag a carton) was susceptible to lay jurors' common sense evaluation as to its property. See Salem* v. *United States Line,* 370 U. S. 31" (italics added).

The jury at bar could have used its "common sense evaluation" to determine whether a space in a working

and walking area rendered the area reasonably fit, absent expert testimony. Appellant argues that Auletti's testimony had some undefined adverse "effect upon the Court . . ." and jury (Court Br. 14), supporting reversal as a matter of law. The record does not support this conclusion. Auletti's bona fides as an experienced handler of cargo was before the jury, to enable them to have evaluated the credibility of his testimony, in regard to an area of testimony which the Supreme Court has stated may not have required expert testimony (*Salem* v. *United States Line,* supra).

Butkowski v. *General Motors Corp.,* 497 F 2d 1158 (Court Br. 14) is inapposite. At bar, plaintiff did not attempt to "prove (his) theory of causation with the testimony of (Auletti) . . ."

Point II of Court brief does not support reversal.

CONCLUSION

The record supports the jury verdict in favor of plaintiff against the shipowner on the theory of unseaworthiness. The Trial Court did not commit reversible error in the submission of the contested issues of fact to the jury.

Respectfully submitted,

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Of Counsel

United States Court of Appeals
For the Second Circuit

376—Affidavit of Service by Mail — The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Jackson O. King
Plaintiff-Appellee
against
Deutsche Dampfs-Ges
Defendant and Third Party Plaintiff-Appellee-Appellant
against
International Terminal Operating Co Inc., et al.
Third Party Defendants-Appellants

State of New York, County of New York, ss.:

Raymond J. Braddick, agent for Sergi & Fetell Esqs., being duly sworn deposes and says that he is the attorney for the above named Plaintiff-Appellee herein. That he is over 21 years of age, is not a party to the action and resides at Levittown, New York

That on the 3rd. day of April, 1975 he served the within

Brief of Plaintiff-Appellee

upon the attorneys for the parties and at the addresses as specified below

1. Haight Gardner Poor & Havens Esqs.
1 State Street Plaza
New York, New York

2. Fogarty McLaughlin & Semel Esqs.
10 Rockefeller Plaza
New York, New York

3. Alexander Ashe Schwartz & Cohen Esqs.
801 Second Avenue
New York, New York

by depositing 3 true copies to each to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned,

that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 3rd. day of April, 1975.

Raymond J. Braddick

Roland W. Johnson
ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977